Kesatuan Pekerja-Pekerja Malaysia Shipyard & Engineering Sdn Bhd v Malaysia Shipyard & Engineering Sdn Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-01–28 OF 2000 AND W-01–29 OF 2000
ZALEHA ZAHARI, ABU SAMAH AND RAMLY ALI JJCA
1 JUNE 2010

Civil Procedure — Appeal — Reinstatement — Application for — Appeals struck out by Court of Appeal — Subsequent application for reinstatement made to different panel of Court of Appeal — Whether second panel estopped from reviewing decision of first panel — Whether appeal rather than reinstatement proper remedy — Principles for reinstatement

Civil Procedure — Appeal — Striking out — Defective record of appeal — Appeal record filed out of time — Appellant failed to rectify record of appeal — Whether proper for appeal to be struck out

The appellant had filed two appeals to the Court of Appeal against a High Court decision. Both the appeals were fixed for hearing in the Court of Appeal on 1 September 2009. At the hearing on 1 September 2009, the appellant's counsel applied for an adjournment to enable counsel to discharge herself on the basis that counsel was unable to get instructions from the appellant. The first respondent's counsel objected to the application on the grounds that: (a) the appellant's record of appeal had been filed out of time; (b) the record of appeal was defective in that it did not contain the High Court's order; and (c) the Court of Appeal had previously reminded counsel that the hearing on 1 September 2009 would be a final date. The Court of Appeal did not allow the adjournment and the appeals were thus struck out. The appellant did not appeal against the Court of Appeal's order striking out the appeals. However, the appellant retained new solicitors who applied through two notices of motion (encls 35(a) and 28(a)) to reinstate both appeals that had been struck out.

Held, dismissing both application with costs:

(1) Three trite principles were applicable, to wit: (a) an applicant (the appellant) could not require a court to reinstate a matter struck out as of right; (b) reinstatement involves an exercise of the court's discretion; and (c) there must be sufficient material before the court to enable it to exercise its discretion in the applicant's (the appellant's) favour (see para 30).

(2) Both the notices of motion (encls 35(a) and 28(a)) were flawed. The instant panel of the Court of Appeal was estopped from reviewing a decision made by another (the previous) panel of a court of co-ordinate jurisdiction. The applicant, if dissatisfied with the decision of the panel of the Court of Appeal on 1 September 2009, ought to have appealed to the appropriate forum, instead of applying for reinstatement (see para 31).

(3) The applications were also flawed because they were supported by an affidavit affirmed by a former secretary of the appellant. There was nothing to confirm that the deponent had been authorised to affirm the supporting affidavit on the appellant's behalf. The deponent did not have the necessary locus standi to affirm the supporting affidavit on the appellant's behalf and thus there was no proper affidavit filed in support of the said applications. The affidavit in support did not also disclose any grounds to justify the reinstatement of the two appeals (see paras 32–33).

(4) The appellant had not taken the necessary steps to expedite a speedy disposal of the appeals. It was also not diligent in pursuing its appeals. It had not taken action to perfect its defective record of appeal filed out of time without leave notwithstanding reminders from the first respondent's counsel and the court. The Court of Appeal panel hearing the appeals on 1 September 2009 clearly had the discretionary power to strike out the two appeals. The applications for reinstatement were devoid of merit and ought to be dismissed with costs (see paras 34–37).

[Bahasa Malaysia summary

Perayu telah memfailkan dua rayuan ke Mahkamah Rayuan terhadap keputusan Mahkamah Tinggi. Kedua-dua rayuan ditetapkan untuk perbicaraan di Mahkamah Rayuan pada 1 September 2009. Semasa perbicaraan pada 1 September 2009, peguam perayu memohon untuk penangguhan bagi membenarkan peguam mengundur diri atas dasar bahawa peguam tidak mendapat arahan-arahan daripada perayu. Peguam responden pertama membantah terhadap permohonan tersebut atas alasan bahawa: (i) rekod rayuan perayu telah difailkan di luar masa; (ii) rekod rayuan adalah cacat kerana ia tidak mengandungi perintah Mahkamah Tinggi; dan (iii) Mahkamah Rayuan telah sebelumnya mengingatkan peguam bahawa perbicaraan pada 1 September 2009 adalah tarikh muktamad. Mahkamah Rayuan tidak membenarkan penangguhan tersebut dan rayuan-rayuan oleh itu dibatalkan. Perayu tidak merayu terhadap perintah pembatalan rayuan-rayuan Mahkamah Rayuan. Walau bagaimanapun, perayu mengekalkan peguam-peguam baru yang memohon melalui notis-notis usul (lampiran 35(a) dan 28(a)) untuk menghidupkan semula kedua-dua rayuan yang telah dibatalkan.

Diputuskan, menolak permohonan-permohonan dengan kos:

(1) Tiga prinsip nyata yang diaplikasi, iaitu: (a) pemohon (perayu) sebagai

hak, tidak boleh memohon kepada mahkamah untuk menghidupkan semula perkara yang telah dibatalkan; (b) penghidupan semula melibatkan pelaksanaan budi bicara mahkamah; dan (c) mesti terdapat material yang mencukupi di hadapan mahkamah bagi membolehkannya melaksanakan budi bicaranya memihak pemohon (perayu) (lihat perenggan 30).

(2) Kedua-dua notis usul (lampiran 35(a) dan 28(a)) adalah cacat. Panel Mahkamah Rayuan ini diestop daripada menyemak keputusan yang dibuat oleh hakim lain (yang terdahulu) panel mahkamah yang mempunyai bidang kuasa setara. Pemohon, jika tidak berpuashati dengan keputusan panel Mahkamah Rayuan pada 1 September 2009, patut merayu kepada forum yang wajar, daripada memohon untuk menghidupkan semula (lihat perenggan 31).

(3) Permohonan-permohonan juga adalah cacat kerana ia disokong oleh afidavit yang disahkan oleh setiausaha perayu yang lalu. Tidak terdapat apa-apa untuk mengesahkan bahawa deponen telah diberi kuasa untuk mengesahkan afidavit sokongan bagi pihak perayu. Deponen tidak mempunyai locus standi yang diperlukan untuk mengesahkan afidavit sokongan bagi pihak perayu dan oleh itu tidak terdapat afidavit yang betul yang difailkan untuk menyokong permohonan-permohonan tersebut. Afidavit sokongan tidak mengemukakan apa-apa alasan untuk menjustifikasikan penghidupan semula kedua-dua rayuan tersebut (lihat perenggan 32–33).

(4) Perayu tidak mengambil langkah-langkah yang perlu untuk mempercepatkan pelupusan rayuan-rayuan dengan segera. Ia tidak teliti dalam membuat rayuan-rayuannya. Ia tidak mengambil tindakan untuk memperbaiki rekod rayuannya yang cacat yang difailkan di luar masa tanpa keizinan walaupun terdapat peringatan-peringatan daripada peguam responden pertama dan mahkamah. Panel Mahkamah Rayuan yang mendengar rayuan-rayuan pada 1 September 2009 jelas mempunyai kuasa budi bicara untuk membatalkan kedua-dua rayuan. Permohonan-permohonan untuk menghidupkan semula tidak mempunyai merit dan patut ditolak dengan kos (lihat perenggan 34–37).]

Notes

For cases on reinstatement of appeal, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1435–1439.

For cases on striking out of appeal, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1498–1508.

Cases referred to

Capital Insurance Bhd v Kasim bin Mohd Ali [2000] 1 MLJ 193; [2000] 1 CLJ 269, CA (refd)

Legislation referred to

Industrial Relations Act 1967 ss 26, 56

Appeal from: Originating Motion Nos R1–25–141 of 1996 and R1–25–31 of 1998 (High Court, Kuala Lumpur)

Hassan Karim (Hassan Karim & Co) for the appellant.
N Sivabalah (E Reena with him) (Shearn Delamore & Co) for the respondents.

Zaleha Zahari JCA (delivering judgment of the court):

[1] The applicant, is the appellant in both Appeal No W-01–28 of 2000 ('the first appeal') and Appeal No W-01–29 of 2000 ('the second appeal'). The first appeal is against the decision of the Kuala Lumpur High Court dated 28 March 2000 dismissing the applicant's application for certiorari to quash part of the award of the Industrial Court in respect of Award 479 of 1996 on remedies which was the subject matter of Kuala Lumpur High Court No R1-25–141 of 1998.

[2] The second appeal is a related appeal. The applicant is appealing against the High Court decision on the same date in allowing Kuala Lumpur High Court No R1-25–31 of 1998, the first respondent's application for certiorari to quash the entire Award 479 of 1996.

[3] Both appeals were struck out by the Court of Appeal at its sitting on 1 September 2009.

[4] By notice of motion (encl (35a)) in the first appeal, and notice of motion (encl (28a)) in the second appeal, both dated 7 October 2009 ('the said applications'), the applicant prayed, inter alia, for an order that the appeal specified in the respective notice motion which had been struck-out on 1 September 2009 by the Court of Appeal be reinstated and the registrar be directed to fix a new date for hearing of the said appeal. The said applications did not identify under which provisions of law it was based.

BACKGROUND

[5] The circumstances which led to the appeals referred to in the said applications being struck out was this.

[6] The appeals are concerned with a retrenchment exercise implemented by the first respondent on 1 March 1987 which affected a total of 342 employees.

The retrenched employees were paid salary in lieu of notice and retrenchment benefits under cl 47 of Award 122 of 1985 of the collective agreement which was then applicable. The applicant then filed a complaint under s 56 of the Industrial Relations Act 1967 alleging, inter alia, non-compliance of cll 47.2 and 47.3 of the collective agreement.

[7] The Industrial Court heard the complaint and dismissed the same vide Award No 111 of 1987 dated 1 April 1987. The Industrial Court ruled that the first respondent had complied with cll 47.2 and 47.3 and upheld the procedure implemented by the first respondent, ie, in departing from complying with the 'Last In First Out' policy. Thereafter, the applicant filed Johor Bahru High Court OM No 32–57 of 1987 for an order of certiorari to quash Award No 111 of 1987. The applicant's certiorari proceedings were dismissed by the Johor Bahru High Court on 17 November 1988.

[8] Subsequent to the retrenchment exercise, 270 retrenched employees entered into individual agreements with the first respondent and received the first of three installment payments amounting to RM383,000. The first respondent could not effect subsequent installment payments arising from an injunction obtained on 14 July 1987 by the applicant against, amongst others, the first respondent.

[9] Meanwhile, the applicant filed a representation of trade dispute regarding the retrenchment of 291 of the affected employees ('the claimants'). The matter was referred to the Industrial Court for adjudication under s 26 of the Industrial Relations Act 1967. The Industrial Court (ie the second respondent), in handing down its decision in Award No 479 of 1996, held that the first respondent was wrong to have retrenched the claimants as it had failed to prove that they were excess employees. The Industrial Court then ruled that the claimants were entitled to backwages limited to twenty-four (24) months subject to deduction of the installment of ex-gratia payment and any other benefits already received by the claimants. The Industrial Court also awarded compensation in lieu of reinstatement for the period the claimants served the first respondent.

[10] The first respondent, dissatisfied with the Industrial Court's award, then, vide Kuala Lumpur High Court No R1–25–31 of 1998, applied for an order of certiorari to quash the entire award. At the same time, the applicant, vide Kuala Lumpur High Court No R1–25–141 of 1998, applied for an order of certiorari to quash part of the same award in relation to the remedy given to the claimants which was of a monetary nature and not reinstatement.

[11] On 28 March 2000, the High Court judge allowed the first respondent's application in Kuala Lumpur High Court No R1-25–31 of 1998 and issued an order of certiorari to quash Award No 479 of 1996 with costs. As for the applicant's application in Kuala Lumpur High Court No R1–25–141 of 1998, the High Court judge dismissed the said application with no order as to costs.

[12] The applicant lodged an appeal against these decisions of the High Court to the Court of Appeal, which appeals were struck out by the Court of Appeal on 1 September 2009. The applicant then, vide the notice of motions encl (35a) in the first appeal and encl (28a) in the second appeal applied to reinstate the respective appeal.

[13] In making a considered decision on these two applications for reinstatement the chronology of events from the date of its filing to the date of it being struck out as disclosed in the affidavit filed in support of and in opposition to, as well as the minutes in the court file were taken into consideration.

CHRONOLOGY

[14] Vide letter dated 19 September 2000 the first respondent's solicitors informed the applicant's then solicitors, Messrs Nijar Kumar, Netto & Partners, that the record of appeal which had been filed and served upon them, was not filed within the prescribed time limit. Vide another letter dated 14 June 2005 to Messrs Nijar Kumar, Netto & Partners, the first respondent's solicitors referred to their earlier letter dated 19 September 2000 and informed them that they would be raising this non-observance of the time frame as a preliminary objection on the hearing date of the appeals.

[15] At the case management on 15 March 2007, the first respondent's solicitors raised the issue of the record of appeal being filed outside of the three weeks extension granted by the court. It was pointed out although the lawyer who had been handling the applicant's case passed away in 2004, the application by the appellant's solicitors to discharge themselves was only filed in 2007. The court granted an order-in-terms of the application to discharge Messrs Nijar Kumar, Netto & Partners as the applicant's solicitors on 13 August 2007.

[16] At the subsequent case management dates of 31 January 2008 and 4 March 2008, the applicant's representative was present and was instructed by

the court to appoint counsel.

[17] On the following case management date on 6 May 2008, Messrs Ten & Colin appeared on behalf of the applicant and was instructed by the court to obtain the High Court order and take the necessary action to perfect the record of appeals. The court then fixed the hearing of the appeals for 20 October 2008.

[18] Vide letter dated 13 October 2008 the first respondent's solicitors informed the applicant's new solicitors, Messrs Ten & Colin what had transpired on the case management on 15 March 2007 enclosing copies of their earlier letters dated 19 September 2000 and 14 June 2005. Notice was then given of their intention to raise the issue of the filing of the record of appeal out of time as a preliminary objection.

[19] The situation of these two appeals on the hearing date of the appeals on 20 October 2008 was this. The first respondent's counsel had filed their submissions on 13 October 2008 and were ready to proceed with the hearing. Be that as it may, Ms Norsuhaila Mat Nudin of Messrs Ten & Colin, who appeared for the applicant, informed the court that they had filed an application to discharge themselves as solicitors on 17 October 2008. She then applied for an adjournment of the hearing of the appeals. As the application to discharge referred to by the applicant's counsel was not then before the court, the matter was stood down for the registrar to trace the same.

[20] The appeals were recalled that same day at 11.45am. An application to discharge (encl (19a)) had been filed by the Messrs Ten & Colin in the second appeal (Appeal No W-01–29 of 2000). No application to discharge was filed in respect of the first appeal (Appeal No W-01–28 of 2000).

[21] The position taken by the applicant's counsel then was this. She applied for an adjournment of the hearing of the second appeal to enable her to serve the application to discharge (encl (19a)) on her client. She also sought an adjournment of the hearing of this appeal on its merits pending the disposal of encl (19a). The first respondent's counsel, Encik Sivabalah, did not object to the application for adjournment of hearing of this appeal. The hearing of this appeal (W-01–29 of 2000) as well as encl (19a), was then adjourned to a date to be fixed.

[22] As for the first appeal, (Appeal No W-01–28 of 2000), the applicant's counsel informed the court they were not appearing for the appellant in this appeal and had not filed an application to discharge themselves in respect of

this appeal. Be that as it may, she also applied for this appeal to be adjourned to enable her to obtain instructions from the applicant whether they wish to proceed with this appeal. Encik Sivabalah's response to this request, to leave it to the court. The Court of Appeal upon observing the appeals to be long outstanding granted a final adjournment to a date to be fixed.

[23] The first respondent's solicitors vide letter dated 26 May 2009 to the applicant's subsequent solicitors, Messrs Jessica, Theiva & Kumaari, enclosed their earlier letters dated 19 September 2000, 14 June 2005 and 13 October 2008 to the applicants two previous solicitors informing them that the first respondent reserved its right to object to any application(s) for extension of time pertaining the record of appeal.

[24] At the case management on 26 May 2009 the applicant's counsel was instructed to obtain the High Court order and take the necessary action to perfect the record of appeal. In other words, the position on 26 May 2009 was the same as that on the case management 6 May 2008, on which date the same direction was given. The court then fixed the appeals to 1 September 2009 for hearing.

[25] What transpired on the hearing date of 1 September 2009 culminating in the two appeals being struck out, arising from which the applicant deemed it fit to file these two applications for reinstatement was this.

[26] Ms Jessica Ram Binwani of Messrs Jessica, Theiva, & Kumaari appeared on behalf of the applicant together with Ms S Kumaari, whilst Encik N Sivabalah appeared on behalf of the respondent together with Ms E Reena. The first respondent's counsel, having filed their submissions pertaining to both appeals on its merits on 18 August 2009, was ready to proceed with the hearing of the appeals, in the event their preliminary objection was not allowed. The appellant's counsel then applied for an adjournment to enable them to file an application to discharge themselves on the ground that they were unable to get instructions from their client. En Sivabalah objected to the matter being adjourned. He highlighted the fact that the record of appeal was filed out of time, did not contain the High Court order notwithstanding the several opportunities given by the first respondent's counsel, as well as by the court, to perfect the record of appeal. No steps were taken by the applicant or his counsel to do so. Further, the court in granting an adjournment on 20 October 2008, had pronounced that the subsequent hearing date would be a final date. In this situation, this date being a final date, he urged the Court of Appeal to strike out both the appeals with costs.

[27] The Court of Appeal did not allow the adjournment. The appeals were then struck out. No appeal was lodged against this decision of the Court of Appeal dated 1 September 2009.

THE APPLICATIONS TO REINSTATE (ENCL (35A) AND ENCL (28A))

[28] About five weeks after the appeals had been struck out on 7 October 2009, the applicant, through their new solicitors, Tetuan Hassan Karim & Co, vide encl (35a) in the first appeal and encl (28a) in the second appeal applied for reinstatement of the respective appeal. Both notice of motions came up for hearing on 10 February 2010. The applicant was represented by Encik Hassan Karim of Tetuan Hassan Karim & Co, whilst counsel appearing for the first respondent remained unchanged.

[29] Upon perusal of the affidavit filed in support of and in opposition to the applications, and the submissions of counsel of both parties, encl (35a) and encl (28a) were dismissed. Our reasons are as follows.

[30] In making a considered decision for an application for reinstatement such as this, in the interests of the due administration of justice, three trite principles were borne in mind. Firstly, an applicant could not require a court to reinstate a matter which has been struck out as of right. It is not merely a matter of partaking in an automatic formal exercise. Secondly, reinstatement involves an exercise of the court's discretion. Thirdly, there must be sufficient material before the court to enable it to exercise its discretion in the applicant's favour.

[31] We are of the view both encl (35a) and encl (28a) are flawed. This court is estopped from reviewing a decision made by another panel of a court of co-ordinate jurisdiction. The applicant, if dissatisfied with the decision of the panel of the Court of Appeal on 1 September 2009, the proper recourse for them to take is to appeal to the appropriate forum, and not to apply for reinstatement.

[32] The said applications were also flawed for another reason. They were supported by an affidavit affirmed by a former secretary of the applicant. We borne in mind the fact that the party to the proceedings under appeal is the union, not the deponent of the supporting affidavit to the application in his personal capacity. The exhibit attached to the said applications did not confirm that the deponent had been authorised to affirm the supporting affidavit in respect of these two appeals on the applicant's behalf. Nowhere in the supporting affidavit did the deponent aver that he is a current office bearer

much less a current member of the applicant. As the deponent did not have the necessary locus standi to affirm the supporting affidavit on behalf of the applicant, there was therefore no proper affidavit filed in support of the said applications.

[33] Another infirmity in the affidavit filed in support of the application was this. It did not disclose any grounds to justify the reinstatement of the two appeals. The affidavit merely averred at para 19, that the appeal should be heard on its merits ('demi keadilan kes') and a bare statement as to the court's discretionary powers.

[34] What is abundantly clear from the chronology from the date of filing of the appeals was this. The applicant clearly had not taken the necessary steps to expedite a speedy disposal of the appeals. On the contrary, their conduct in frequently changing counsel has resulted in the hearing of the appeals being repeatedly adjourned. Further, on the hearing date of 20 October 2008, the Court of Appeal had pronounced that no further adjournment would be entertained at the next hearing date in respect of these long-outstanding appeals.

[35] In our view the applicants lack of diligence was also a factor to be taken into account. As at 1 September 2009, the appeal records continued to be defective as it was filed out of time without any leave of court, and did not contain the High Court order under appeal. The applicant nor the various solicitors representing them had not taken the necessary action to perfect the record of appeal notwithstanding the several opportunities and reminders from the first respondent's solicitors, as well as by the court, to do so. They just stood by. That position remained unchanged on the date of hearing of these appeals on 1 September 2009, as well as on the date of hearing encls (35a) and (28a) on 10 February 2010. In such a situation we are in agreement with En Sivabalah's submissions that there was no proper appeal on these dates before the Court of Appeal (see *Capital Insurance Bhd v Kasim Mohd Ali* [2000] 1 MLJ 193; [2000] 1 CLJ 269).

[36] In the circumstances before the panel of the Court of Appeal on 1 September 2009, they clearly had the discretionary power to strike out the two appeals.

[37] Applying settled principles, the applications for reinstatement filed by the applicants were devoid of merit. For the abovementioned reasons encl (35a) and encl (28a) were dismissed. Costs of RM500 to the first respondent.

Both applications dismissed with costs.

Reported by Andrew Christopher Simon